

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

SELLARO,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 92B00151
ELEKTRA RECORDS,)
Respondent.)
_____)

ORDER DENYING COMPLAINANT'S MOTION TO AMEND COMPLAINT
ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT
ORDER DENYING COMPLAINANT'S MOTION TO SUBMIT EVIDENCE
ORDER DENYING COMPLAINANT'S REQUEST AGAINST DISMISSAL
ORDER DENYING RESPONDENT'S MOTION TO DISMISS
AND
ORDER REQUIRING COMPLAINANT TO FILE CLEAR STATEMENT
OF RESPONDENT'S DISCRIMINATORY ACTS

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I. Procedural History

Complainant, Mr. Vincent Sellaro a pro se litigant, filed an undated charge of discrimination in violation of 8 U.S.C. 1324b of the Immigration and Naturalization Act, against Respondent, Elektra Records, with the Office of Special Counsel for Immigration-Related Unfair Employment Practice (OSC). The basis of the charge was national origin discrimination.

In a letter dated May 14, 1992, OSC notified Complainant that, based upon its investigation, it had found insufficient evidence of discrimination and would not be filing a complaint in this case. OSC informed Complainant that he could file a complaint on his own behalf with the Office of the Chief Administrative Hearing Officer, which he did on July 20, 1992. The Complaint, dated July 15, 1992, alleged national origin discrimination only.

A Notice of Hearing on Complaint Regarding Unlawful Immigration-Related Employment Practices, dated July 21, 1992, was served on the parties notifying them of my assignment to the case, Respondent's right to file a timely Answer and the possibility of the issuance of a default judgment should one not be filed. Proper service of the Complaint upon Respondent is evidenced by a copy of a postal service return receipt for certified mail, signed and dated by Respondent, in the case file. I issued a Notice of Acknowledgment on July 29, 1992 which again cautioned Respondent to file a timely Answer.

On August 11, 1992, Complainant contacted our Falls Church, VA office and indicated that Respondent had a "contract" out on him and that it involved cutting off his hand. Complainant contacted this Court on August 14, 1992 and informed my attorney-advisor that he

had been attacked and had had his hand broken. Complainant was advised to contact the police with this information. Complainant then insisted that he wished to continue with his case and asked for procedural information. He was advised of his procedural rights and his burden in establishing a prima facie case.

On August 25, 1992, Complainant contacted this Court to inquire as to whether Respondent had filed a timely Answer. As Respondent had not, Complainant was advised of his right to file a Motion for Default, its requirements and the procedural aspects of that filing. On August 26, 1992, prior to the filing of a Motion for Default, Respondent filed an Answer, affirmative defenses and a Motion To Dismiss. I accepted the filing of Respondent's Answer.

Complainant telephonically contacted my attorney-advisor on August 28, 1992 to inquire about the status of the case. During the conversation, jurisdiction of this Court was explained to Complainant, i.e., that this Court has jurisdiction in cases of national origin discrimination where the employer, recruiter or referrer for a fee, employs more than three (3) but fewer than fifteen (15) individuals, and in cases of citizenship discrimination where there is no restriction on the number of employees. At that time, Complainant inquired into the procedure to amend his Complaint to include an allegation of citizenship status discrimination. The procedure, requirements and discretionary nature of this motion were explained to Complainant in detail by my attorney-advisor.

On September 8, 1992, Complainant filed several typed documents. These documents did not include captions, titles, signatures or dates and were accompanied by an undated, signed, Certificate of Service (COS) marked "SAMPLE" which had been previously provided to Complainant. The COS did not name the documents it accompanied or provide the name or address of the opposing party which would show that the documents had been served. After reviewing these documents, I inferred that they were intended to be a Motion to Amend Complaint, a Response to Respondent's Motion to Dismiss and a Motion for Default.

On September 14, 1992, Complainant filed several torn, untitled, uncaptioned, undated, and unsigned letters accompanied by a signed, dated copy of the Court-provided sample Certificate of Service. Again, there was no indication of the type of documents it accompanied. After a review of these papers, I inferred that these were Complainant's

Reply to Respondent's Answer, Complainant's Motion to Submit Evidence, A Request Against Dismissal, a Partial Statement of Facts of the Case, a copy of a certified mail receipt which Complainant alleged corresponded to the mailing of the Complaint to OSC, and a copy of the alleged last page of the Complaint which contains a July 15, 1992 date and Complainant's signature.

II. *Discussion*

A. Complainant's Motion to Amend Complaint, Motion for Default, Motion to Submit Evidence and Request Against Dismissal

Complainant's alleged motions, enumerated directly above, were sent to the Court with deficient Certificates of Service. The most serious deficiency is that there is no indication that Respondent ever was served. 28 C.F.R. 68.6. Without proper service, it is not possible for Respondent to file a response. 28 C.F.R. 68.11. Without proper service, these motions must be denied.

Should Complainant wish to have these alleged motions considered by the Court, I direct that Complainant must serve these documents on Respondent and refile them with the Court on or before October 20, 1992 with a PROPER Certificate of Service (COS) in both instances, i.e., the COS should not state that it is a sample and should be dated, signed, list the documents served, and contain Respondent's name, address and manner of service. Complainant should refer to the COS accompanying this Order and/or the COS accompanying Respondent's Motion to Dismiss before preparing his COS so that he can follow their format.

In an effort to maintain this case in proper procedural posture and, in the interest of judicial economy, I think that it is important for Complainant to be aware, before he makes his decision regarding the refiling of these motions, that his Motion to Submit Evidence is premature at this time. Complainant should also be aware that since I have accepted Respondent's late Answer, a Motion for Default at this time would be moot and would be denied. Further, should Complainant refile his Motion to Amend Complaint, it should contain legally relevant reasons for the request such that they will persuade the Court that there is good cause to grant his request. Therefore, with this Order, Complainant's Motion to Amend Complaint, Motion for Default, Motion to Submit Evidence and Request Against Dismissal are denied, without prejudice to refile if Complainant wishes.

With regard to Complainant's Reply to Respondent's Answer and Complainant's Partial Statement of Facts, should Complainant wish these documents to be considered as part of the record, they too must be properly served and refiled.

B. Respondent's Arguments in its Motion to Dismiss

As Complainant's response to this motion was filed with a deficient Certificate of Service, along with the motions discussed above, I have considered whether it is appropriate to make a determination on Respondent's Motion at this time. After a review of the record and the relevant regulations, I have determined that, in the interests of justice, fairness and judicial economy, a ruling at this time is appropriate as neither party will be prejudiced.

Respondent has argued that this case should be dismissed for the following reasons:

1. Complainant has not complied with the requirements of 28 CFR 68 in that his Complaint was not signed or dated.
2. Complainant's allegations are unclear and he has not stated a claim upon which relief can be granted.
3. Complainant has not stated a claim which invokes the jurisdiction of this Court as Complainant is a U.S. citizen.

Under the relevant regulations, Complainant had a right to respond to this motion and put forth his position as it pertained to each of Respondent's arguments prior to my ruling on the motion. 28 C.F.R. 68.11. On September 8, 1992, Complainant filed an unsigned, undated, untitled document which I determined to be Complainant's response to Respondent's motion. It stated in its entirety:

I also request the case stay open(sic) Vincent J(sic) Sellaro 85 Pearl st(sic) CA m bridge(sic) MA ss(sic) 02 o2(sic) I39(sic)".

It is obvious that Complainant's response does not address any of Respondent's arguments.

1. Complaint is unsigned

Under 28 C.F.R. 68.7, Complainant must sign his complaint. Respondent has submitted Exhibit #1 which it asserts is an unsigned

complaint. In response, Complainant has submitted what he asserts to be the signature page to his Complaint.

Exhibit #1 is, in fact, unsigned by Complainant. However, Exhibit #1 is a copy of the OSC's Charge Form; it is not the Complaint. It should be noted that the Charging Form is not incorporated into the Complaint; it is a separate and distinct document.

I have compared Complainant's submission with the court's file copy of the Complaint and have determined that the signature pages match. Therefore, I find that Complainant has signed his Complaint and has complied with the regulations in that regard. Thus, I will not dismiss Complainant's Complaint on this basis. At this point, I will admit to some confusion as to Respondent's assertion of this argument as the Court file evidences proper service of the Complaint on Respondent.

2. Complainant has not provided a clear statement of facts and has not stated a claim upon which relief can be granted

Respondent quotes three statements from Complainant's charging document as support for its argument. The first statement pertains to when the discriminatory acts took place and is as follows:

on 2 separate occasions (sic) the 1st time about 250 days ago from a telephone 617 8640237 the second time late NOV TEL; 617 4929746 to FEB 617 492 9525

The Court agrees with Respondent's argument that this statement is unclear and of little help in ascertaining when the alleged discriminatory events took place. However, I find it significant that the statement is contained in the charging document and not in the Complaint.

I have, though, reviewed the Complaint. One purpose of a complaint is to put Respondent on notice of the claim against it so that it can mount a defense. One defense that any Respondent might have is that Complainant has filed an untimely claim, i.e., a claim filed more than one hundred eighty (180) days from the discriminatory act (absent equitable tolling). Thus, Complainant's allegations regarding the dates of the discriminatory acts are most important.

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The Complaint reveals that Complainant's statement there regarding the date of the alleged discrimination is different from that found in the charging document and is also unspecific. It states:

I was not hired on Feb 92
Elektra Records Reneged on There (sic) Oral Agreement in October

As Complainant's allegations regarding this information are unclear, unspecific, and appear inconsistent to those in the charging document, Complainant has arguably denied Respondent the possibility of raising a timeliness defense. The remedy for this deficiency will be discussed later in this Order.

The second statement that Respondent argues is unclear regards Complainant's statement in the charging document describing where the discriminatory act(s) took place. Complainant's statement is, in its entirety:

MY address Cambridge MASS HIS ADDRESS NY: NY TEL 4847908

Although this statement is not crystal clear, it seems reasonable to assume that, when considered with all the information contained in the charging document, Complainant is alleging that the discriminatory act occurred during a telephone conversation while he was at his home and Respondent was in New York.

Again, I find it significant that the statement objected to is found in the charging document from OSC and not in the Complaint. A review of the Complaint form, though, reveals that there is no section which requires Complainant to allege where the discrimination took place.

I find that any deficiencies in Complainant's statement as to where the discriminatory act took place do not inhibit Respondent's ability to answer the Complaint. I find further that Respondent is not prejudiced by this holding as Respondent may gather more detailed information regarding the place of the discriminatory act through the discovery process. Therefore, dismissal is not appropriate based on this argument. However, in the interest of fairness and judicial economy, I have provided an immediate remedy for this descriptive shortfall later in this Order.

The third statement which Respondent asserts was unclear is Complainant's statement describing the discriminatory acts. The following

is the disputed statement, again from the charging document, in its entirety:

In regards (sic) to record co recording (sic) contract Breech of Implied contract (sic) on 2 different occasions (sic) the 1st time was based upon proving (sic) page 2 stapled to this piece of paper the 2nd time was based on proving (sic) support action assistance from one of the competitive organizations and I like (sic) to also mention there is also a violation of comparable worth. Discrimination (sic) of 2nd name national origin.

The Court agrees with Respondent's argument that this statement is unclear and does not answer the question stated on the charging form, i.e., describe the discrimination.

A review of the Complaint form reveals that there is a question which arguably asks the same question as the charging form, "State the reason you were not hired." Complainant's answer simply was "National Origin". As the Complaint form has several sections which allow Complainant to allege that the discrimination he complains of is based on national origin, I find that the section which states: "State the reason you were not hired" requires a statement describing the discriminatory act. Obviously, Complainant did not do this.

As the Court is sensitive to Complainant's pro se status, I have determined that it would be premature to dismiss this case at this time based on the lack of clarity in Complainant's statements regarding either the date of the discriminatory act or the description of the act itself. However, these are serious deficiencies and must be remedied at once. Therefore, Complainant is directed to file with this Court, and to serve on Respondent with a proper COS, on or before, October 20, 1992, a clear statement of the following for each alleged discriminatory act:

- a. the exact date of the discriminatory act,
 - b. a clear description of the events which are alleged to amount to national origin discrimination, and
 - c. A clear statement describing where each discriminatory act occurred.
3. Complainant is a U.S. citizen and is not covered under 8 U.S.C. 1324b

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As to Respondent's third argument, it fails as prevailing law holds otherwise. See, e.g., Lewis v. McDonald's Corporation, 2 OCAHO 383 (10/4/91). Therefore, I will not dismiss on this basis.

III. Notice to Office of Special Counsel for Immigration Related Unfair Employment Practice (OSC).

Since the Complainant has alleged that the injury he reportedly sustained may be a retaliatory act by the Respondent, the OSC may wish to investigate this allegation.

IV. Order

IT IS ORDERED THAT:

1. Complainant's Motion to Amend Complaint is denied.
2. Complainant's Motion for Default is denied.
3. Complainant's Motion to Submit Evidence is denied.
4. Complainant's Request Against Dismissal is denied.
5. Respondent's Motion to Dismiss is denied.
6. Complainant must file, on or before October 20, 1992, a clear statement detailing each of Respondent's allegedly discriminatory acts which Complainant alleges to be based on national origin discrimination. Complainant must include the date and place each event occurred in his statement.

IT IS SO ORDERED this 1st day of October, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge